United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1885

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To be argued by
MARGERY EVANS REIFLER

United States Court of Appeals
FOR THE SECOND CIRCUIT

TYRONE BENJAMIN LARKINS,

Plaintiff-Appellee,

against

RUSSELL G. OSWALD, Commissioner of Correction of New York State; ERNEST L. MONTANYE, Warden of Attica Correctional Facility; LIEUTENANT LEMAR A. CLOR; and SOCIAL WORKER GERALD ELMORE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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Questions Presented

1. Was there a proper basis for imposing liability on the defendants by summary judgment?

2. Did the District Court err in imposing personal liability on defendants Commissioner and Warden when there was no proof to support the liability?

3. Apart from the error in imposing liability, did the District Court err in denying defendants' motion to set aside the verdict as excessive?

Statement

This is an appeal from an order of the United States District Court, Western District of New York (CURTIN, J.) dated October 5, 1973 and from a judgment dated March 15, 1973. The order of the District Court denied defendants' motion for summary judgment and granted partial summary judgment to plaintiff Larkins on the issue of defendants' liability for placing plaintiff in segregated confinement at Attica Correctional Facility. After a jury trial on the issue of damages, a judgment of $1,000 was entered against the defendants.

Facts

On June 6, 1972, plaintiff, an inmate at Attica Correctional Facility, Attica, New York, was observed with a group of five other inmates in a yard of the prison. Two correction guards, suspicious of his behavior since he appeared to be lecturing to the group, searched his cell and found certain handwritten material which was confiscated.* This material consisted of a letter addressed to "Bro. Bob" and two documents called the "Central Revolution Format" and "The Black Panther Party, Ten Point Program—Platform" (A. 23a-29a). On June 7, 1972, plaintiff appeared before the Attica Adjustment Committee.* Considering, *inter alia,* the nature of these materials, plaintiff's attitude toward institutional policies, and his ad-

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* The officers also searched the cell of another inmate in the group, one Larry Tinsley. Notes describing a bomb were found in his cell. Mr. Tinsley was also brought before the Adjustment Committee where he was counselled and released (A. 37a-40a).

* The Adjustment Committee is a hearing and counselling board consisting of three employees designated by the Superintendent, one of whom is an officer of the rank of lieutenant or higher, and one of whom is not a member of the uniformed service. See generally, 7 NYCRR Part 252.

vocacy of disruption of the institution to other inmates, plaintiff was sentenced to seven days confinement in HBZ (segregation) with loss of yard and recreation privileges (A. 31a-36a). The reasons for plaintiff's confinement to segregation are a material issue of dispute in this action, but were nonetheless decided adversely to the defendants, including the Commissioner, by summary judgment.

Plaintiff actually spent twelve days in the segregation unit although the record is void of any explanation for the additional five days confinement or by whose orders or inadvertence the additional confinement occurred.

Prior Proceedings

A. *Pro Se Action*

Plaintiff filed a *pro se* civil rights complaint (denominated a petition) in the United States District Court for the Western District of New York, alleging that he was being punished solely for the possession of political writings. He sought his release from segregation and $5,000 in damages and named as defendants only the Commissioner of Correction and Warden (now Superintendent) of Attica Correctional Facility (A. 5a-6a). Defendants responded that the material found in plaintiff's cell was inflammatory and contained language which suggested that it was to be transmitted to others. They have further asserted that clandestine activity appeared to be taking place in the facility (A. 7a-8a).

On September 13, 1972, the District Court dismissed as moot plaintiff's application for injunctive relief since he had already been released from segregation. As to plaintiff's claim for damages, the Court ordered that plaintiff be allowed to proceed *in forma pauperis* and assigned counsel (A. 10a).

B. *Proceedings with Counsel*

Assigned counsel for plaintiff filed a complaint with the Court invoking jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 and seeking $5,000 in damages. The complaint alleged that plaintiff was punished for the possession of political writings, in violation of his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. The complaint specifically averred that the writings were not being distributed or published by plaintiff. Defendants Clor and Elmore, a lieutenant and social worker at Attica, both members of the Adjustment Committee, were added as defendants. It was further alleged that the Commissioner and Warden knew or should have known of plaintiff's allegedly unlawful segregation but failed to act to release him (A. 13a-15a).

Defendants' answer denied that the materials were not being distributed or published. It denied that any constitutional rights of plaintiff's had been violated and alleged affirmatively that defendants acted at all times lawfully and within the scope of their authority (A. 16a-17a).

Defendants then filed a motion for summary judgment, annexing all documents relating to plaintiff's Adjustment Committee appearance, as well as affidavits from defendant Clor, Chairman of the Adjustment Committee, and the two correctional officers involved in the incident (A. 18a-48a). The motion papers sought to establish that plaintiff was not punished for the possession of the materials confiscated from his cell but for other reasons. Defendants averred that the writings were intended for circulation, that plaintiff was charged and did not deny advocating to other inmates the disruption and overthrow of the institution, and that plaintiffs' attitude toward institutional policies was belligerent and uncooperative. The papers drew notice to the September, 1971 riot at Attica; to the need to maintain a safe climate at the prison and present a potentially explosive situation; and to plaintiff's own responsibility for maintaining order.

Plaintiff responded with a cross-motion for summary judgment, including an affidavit from his attorney and some of the papers which had been submitted in the pro se stage of the proceedings (A. 45a-52a). It was plaintiff's position that he was punished *solely* for the possession of political writings and that no other charge was lodged against him. He acknowledged that the circulation of the documents was at issue.

C. *District Court Opinion*

In an opinion dated October 5, 1973 (A. 53a-56a; 346 F. Supp. 1374), the District Court found the defendants liable for a violation of plaintiff's constitutional rights. Despite the existence of an obvious and genuine issue of fact at least as to the reasons for plaintiff's confinement to segregation, the Court resolved the issue itself, granting partial summary judgment to plaintiff; the question of damages was reserved. As to the reasons for plaintiff's punishment, the Court noted the discrepancy between the institutional documents relating to the Adjustment Committee proceeding and the affidavit of defendant Clor, submitted on defendants' motion for summary judgment. Choosing to disbelieve the affidavit, the Court concluded that plaintiff was never charged with advocating the overthrow of the institution to other inmates. It found any additional reasons for punishment unsupported by the record. Concluding that plaintiff was punished solely for the possession of political writings, the Court found that plaintiff's rights had been violated, citing *Sostre* v. *McGinnis*, 442 F. 2d 178, 202-203 (2d Cir. 1971), *cert. den. sub nom. Oswald* v. *Sostre*, 404 U.S. 1049, 405 U.S. 978 (1972).

D. *Jury Trial*

A jury trial on the question of damages only was held on January 25 and 28, 1974. Plaintiff testified for himself and called as a witness a Departmental of Correctional Services employee. The defense called two Department of

Correctional Services employees. The jury returned a verdict of $1,000. Judgment was entered against the defendants on March 15, 1973 (A. 60a). Defendants' motion to set aside the verdict as excessive was denied (A. 57a-59a).

POINT I

The District Court erred in granting plaintiff's motion for summary judgment since there was no proper basis for imposing liability upon the defendants.

According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment can be granted only if it is clear that there is no genuine issue as to any material fact. E.g., *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962); *Dochler Metal Furniture* v. *United States*, 149 F. 2d 130, 135 (2d Cir. 1945). The court is not free to credit or discredit evidence presented on the motion. *Poller, supra* at 473; *Colby* v. *Klune*, 178 F. 2d 872 (2d Cir. 1949); *Arnstein* v. *Porter*, 154 F. 2d 464 (2d Cir. 1946). If there is any genuine issue as to a material fact, then the motion must be denied and the case should proceed to trial.*

The District Court's action on the cross-motions for summary judgment in the instant matter presents a classic case in which the Court itself resolved material facts in dispute, rather than denying the motions. Moreover, in doing so, the Court chose to credit certain testimony and discredit others.

The basic factual issue in dispute here is the reason for plaintiff's placement in segregated confinement. Plaintiff

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* Thus, if the moving party fails to meet its initial burden of establishing the absence of dispute as to the material facts, the court must deny the motion, even though the other party has submitted no opposing evidentiary material. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-61 (1970).

has maintained, in his pro se papers, his complaint, and his cross-motion for summary judgment that he was punished *solely* for the possession of political materials, an alleged violation of his constitutional rights under *Sostre* v. *McGinnis, supra.*

Defendants, on the other hand, have consistently maintained that there were other reasons for plaintiff's punishment, reasons which support their position that there was nothing unlawful about his placement in segregation. The defendants maintained that plaintiff was also charged with advocating the disruption of the institution to the inmates he had met in the yard; that the content of the material taken from his cell (especially the letter) indicated that it was meant to be disseminated to others; and that plaintiff's attitude toward institutional policies was belligerent and uncooperative.

The rules and regulations of the Department of Correctional Services specifically provide that punishment of inmates is to be assessed in light of "the particular circumstances involved; the overall behavior pattern of the inmate; and the problems in and the present atmosphere of the facility." 7 NYCRR § 250.2(b). Indeed the Adjustment Committee is directed to take action "upon its evaluation of the inmate's attitude and his overall adjustment to the discipline and order that must be maintained in the facility, *as well as* upon the committee's evaluation of the facts and circumstances of the particular incident . . ." 7 NYCRR § 252.5(b) (emphasis added). Discipline is imposed to regulate an inmate's behavior, to assist in obtaining compliance by the entire inmate population with prescribed standards of behavior, and to preserve the confidence of both inmates and staff in the necessity of maintaining such standards. 7 NYCRR § 250.2(c). If defendants are allowed to prove that their confinement of plaintiff was based on the above-mentioned factors, they believe that their action would be sustained as lawful.

However, the District Court itself either resolved the claims or ignored them. The Court chose to disbelieve defendant Clor's affidavit stating that plaintiff was charged with advocating the disruption of the institution. The District Court was without power to discredit this testimoney on a motion for summary judgment (*supra* at 6). When plaintiff's cross-motion for summary judgment denied that this charge was made, a material issue of fact was clearly in dispute. The Court only mentioned in passing the Committee report on plaintiff's attitudes toward institution policies and ignored plaintiff's prior disciplinary record. It ignored factors peculiar to the problems and present atmosphere of the facility.* It did not discuss the issue of whether or not the confiscated material, particularly the letter, indicated an intent to disseminate the materials.

Instead, the District Court was concerned with the discrepancy between the prison documents relating to the Adjustment Committee proceeding and the averments made out on defendants' motion for summary judgment. The documents pertaining to the Adjustment Committee proceeding (A. 31a-36a) did not specify all the reasons for punishment later averred by the defendants. The meaning and weight of these discrepancies is a matter which can be resolved only after hearing the testimony of the persons involved. Likewise, when the Court found that any additional reasons for plaintiff's confinement were unsupported by the record, it made a finding of fact which should have been resolved at trial. The absence of such evidence in the record before the Court does not prove that there was no evidence before the Committee. Testimony by the plaintiff and the Committee members would

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* The papers submitted on defendants' motion made reference to the recent Attica riot and the potentially explosive climate in the prison (A. 21a, 41a-43a). This Court is familiar with the situation. *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F. 2d 12 (2d Cir. 1971).

allow the resolution of this issue. This too is an issue of fact which should be resolved at trial.

Moreover, as defendants show (Point II, *infra*), it was incumbent upon plaintiff to first establish the personal responsibility of the two defendants who were members of the Adjustment Committee and of the Commissioner and Warden. See *Johnson* v. *Glick*, 481 F. 2d 1028, 1034 (2d Cir. 1973), citing *inter alia*, *Martinez* v. *Mancusi*, 446 F. 2d 921 (2d Cir. 1970). In that event, the Adjustment Committee, as an official hearing body, is entitled at least to show its limited official immunity and good faith, and likewise, the Commissioner and the Warden are entitled to show their right to official immunity, apart from their total non-participation in the entire matter. *Scheuer* v. *Rhodes*, —— U.S. ——, 42 U.S.L.W. 4543 (April 17, 1974); *Fitler* v. *Rundle*, 497 F. 2d 794 (3rd Cir. 1974); *Huitt* v. *Viteck*, 497 F. 2d 598 (1st Cir. 1974); *Palmigiano* v. *Muller*, 491 F. 2d 978, 980 (1st Cir. 1974); *Reilly* v. *Doyle*, 483 F. 2d 123, 128-29 (2d Cir. 1973). As we have noted, defendants tendered as a defense the contention that they proceeded "lawfully and within the scope of their authority." This, we submit, was admitted by plaintiff's motion since the good faith of the defendants was not placed in question.

Finally, although established at trial that plaintiff spent twelve days in segregation, there is no evidence that these defendants are liable for any more than the seven days confinement which was ordered. There is no evidence which explains the extra five days confinement nor establishes defendants' responsibility for this additional period.

In short, there were several genuine issues of material fact before the District Court when it was confronted with the cross-motions for summary judgment, and the resolution of those issues would then require consideration of the responsibility and defenses of the defendants. This being the case, the motions should have been denied and the case set down for trial.

POINT II

The District Court compounded the manifest error on summary judgment by the imposition of personal liability on defendants Commissioner and Warden without any proof to support the liability.

In addition to contending that summary judgment was erroneously granted when material factual issues are in dispute, defendants Commissioner and Warden particularly maintain that there was no basis for the imposition of any liability on either of them by summary judgment. The District Court did not separately discuss the issue of their liability as defendants because it erroneously construed the pleadings as an admission. We maintain that summary judgment should have been granted at least in favor of these defendants.

In his complaint, plaintiff alleged only that the Commissioner and Warden knew or should have known of his unlawful confinement and nonetheless failed to act to release him (A. 14a). Defendants' answer averred: "Neither deny nor admit . . . for the reason that the defendants at all times acted lawfully and within the scope of their authority" (A. 16a). Plaintiff's cross-motion for summary judgment suggested that this answer amounted to an admission under F.R. Civ. Proc. 8(d) (A. 49a-50a). The District Court apparently accepted this theory. This was manifestly erroneous.

There was no intention on the part of the defendants to make any such admission. On the contrary, it was intended to put plaintiff to his proof. Indeed, there is not a scintilla of factual allegation to show any responsibility of the Warden for the determination of the Adjustment Committee,*

* Indeed, the only relevant document in the record is the "Superintendent's Action on Review of Adjustment Committee Report." This document is *not* signed by the Warden, but by one of his deputies, R. T. Curtiss (A. 31a).

let alone the Commissioner, located in Albany, to whom the plaintiff had an available recourse which was not utilized (A. 32a). Obviously there was lacking any proof that the Warden or Commissioner had anything to do with the incident or were obligated to know about such an incident in a prison then holding 1200 inmates. The vitality of the alternatively pleaded allegation "knew or should have known", which the Court erroneously deemed admitted, is in serious question when no supporting facts are alleged.

Since liability under 42 U.S.C. § 1983 is entirely personal in nature, e.g., *Monroe* v. *Pape,* 365 U.S. 167 (1961); *Sostre* v. *McGinnis, supra* at 205, the Commissioner and Warden believe it was a gross miscarriage of justice and contrary to law to impose liability on them by summary judgment for the asserted defect in the form of the denial in their answer. It was plaintiff's burden to establish the responsibility of such defendants. See, e.g., *Bracey* v. *Grenoble,* 494 F. 2d 566, 569-71 (3rd Cir. 1974); *Wright* v. *McMann,* 460 F. 2d 126, 134-36 (2d Cir.), *cert. den. sub nom. McMann* v. *Wright,* 409 U.S. 885 (1972). Until such proof is presented, there was no occasion for defendants to controvert the allegation as well as present any defenses, such as official immunity and good faith (*supra* at 9).

There was, beyond a doubt, at least a genuine issue of fact at least as to the responsibility of the Commissioner and Warden, this issue should not have been decided by summary judgment against the defendants. There is nothing in the record to support the liability of these two defendants and no indication that any such facts can be supplied upon remand. Summary judgment should have been rendered to these defendants. However, if this Court concludes that plaintiff should be given the opportunity to present factual support, it is at least patent that the disposition by the court below cannot stand.

POINT III

Apart from the error in imposing liability, the District Court should have granted defendants' motion to set aside the verdict as excessive.

We firmly believe that the Court acted improperly in summarily imposing liability upon the defendants, but submit also and alternatively that the damages are excessive. This Court has established that the exercise of a trial court's discretion in deciding a motion to set aside a verdict as excessive can be reviewed on appeal. *Yodice* v. *Koninklijke Nederlandsche Stoomboot Maat,* 471 F. 2d 705 (2d Cir. 1972), *cert. den.* 411 U.S. 933 (1973); *Dangello* v. *Long Island Railroad Co.,* 289 F. 2d 797 (2d Cir. 1961). The lower court's refusal to set aside the verdict as excessive will be refused if:

> ". . . the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable man may differ, but a question of law." *Id.* at 806*

In making its determination, this Court must make a detailed appraisal of the evidence which bears on damages. *Gruenthal* v. *Long Island Railroad Co.,* 393 U.S. 156, 159 (1968); *Yodice* v. *Koninklijke Nederlandsche Stoomboot Maat, supra* at 707.

A review of the evidence at trial in the instant case reveals that the award of $1,000 for twelve days segrega-

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* This Court has not hesitated to act in applying this standard. E.g. *Botsford* v. *Ideal Trucking Co.,* 417 F. 2d 681 (2d Cir. 1969); *Wicks* v. *Henken,* 378 F. 2d 395 (2d Cir. 1967); *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F. 2d 583 (2d Cir. 1961), *cross pet. for cert. den.* 368 U.S. 989, 370 U.S. 937, *reh. den. sub. nom. Richardson* v. *Moore-McCormack Lines, Inc.,* 370 U.S. 965 (1962).

tion confinement was clearly excessive as a matter of law. As plaintiff's attorney readily admitted at trial, the facts of his confinement are substantially undisputed (T. 129).* Plaintiff was in segregation for twelve days (T. 109-11). He was in a cell the same size and with the same basic furnishings as those in general population (T. 39-44, 51-54, 63-64, 68, 74-76, 100, 106). The cell was lighted and ventilated (T. 41, 44, 64) and contained a mattress, sheet and a blanket for the bed (T. 40, 63-64, 75-76). Plaintiff was clothed and allowed to have in his cell some of his personal effects (T. 62-63, 72-73), as well as limited commissary (T. 95). The food served to him was the same as that in general population (T. 84).

Plaintiff's cell was on a corridor of cells and he could talk with other inmates along the corridor (T. 84). In addition, during his twelve days in segregation, plaintiff made two visits to the prison hospital (T. 78-79, 112), had two or three showers (T. 83, 115), and had one visit from an attorney (T. 115).

Since the conditions of plaintiff's segregated confinement were the same as those in general population, his damage claim was based on the one thing he lacked—recreational (yard) privileges (T. 61-62, 77-78), which included, for general population, television, sports, and other exercise. Plaintiff testified that the lack of fresh air or exercise had a "psychological effect"—to wit, he lost his sense of concentration and gained a sense of laziness (T. 85). This was the plaintiff's sole complaint about his segregated confinement. There was no expert testimony about the effect or potential effect of twelve days in segregation under these conditions. Plaintiff, in effect, was awarded $1,000 for the loss of yard privileges. This amounts to approximately $83.00 per day or $30,000 on an annual basis. Defendants submit that this award was clearly excessive in

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* All numbers in parentheses following the letter "T" refer to the transcript of the jury trial on damages.

light of testimony which distinguished plaintiff's confinement from that in general population only by the loss of recreational activity.

An examination of other awards in this area clearly supports the defendants' position. Cf. *Moore-McCormack Lines, Inc.* v. *Richardson, supra* at 587. In *Sostre* v. *Rockefeller,* 312 F. Supp. 863 (S.D.N.Y. 1970), the claimant was confined for 372 days under conditions the Court found physically harsh and dehumanizing. The District Court's award of $25 per day compensatory damages was approved by this Court on appeal and characterized as "not unreasonable". *Sostre* v. *McGinnis, supra* at 205, n. 52. The crux of the award in that case was claimant's isolation from human contact for a lengthy period of time. No such danger is present in the instant case. In *Wright* v. *McMann,* 321 F. Supp. 127 (N.D.N.Y. 1971), *aff'd. in relevant part,* 460 F. 2d 126 (2d Cir.), *cert. den. sub nom. McMann* v. *Wright,* 409 U.S. 885 (1972), an inmate was confined, sometimes naked, in a cell furnished only with a sink and toilet. There was no bed or bedding, no chair or stool, no lighting, and no heat. The cell was not clean and the inmate was deprived of items of personal hygiene as well as his eyeglasses. The inmate received $1,500 in damages for the thirty-two days he spent in segregation. Although the conditions of confinement were obviously more severe than those in the instant case, and the confinement longer, the inmate in the *Wright* received only $47 per day in damages.

In *United States ex rel. Neal* v. *Wolfe,* 346 F. Supp. 569 (E.D. Pa. 1972), an inmate spent 16 days in segregation. During at least part of that time there was no light, a steel sheet as a bed, no reading material except the Bible, no exercise privileges, no showers, no visits and no commissary. The inmate was not allowed to speak to other inmates, was naked part of the time, and was on a reduced diet. The Court awarded $25.00 per day in damages. See also *Smallwood* v. *Preiser,* 73 Civ. 1765 (S.D.N.Y. January

18, 1974) (POLLACK, J.) (120 days in segregation—award of lost wages* plus $1.00 nominal damages); *Castor* v. *Mitchell,* 355 F. Supp. 123 (W.D.N.C. 1973) (30 days in segregation—$1.00 nominal damages).**

The $83.00 per diem awarded to plaintiff is over two and three times that awarded to inmates who suffered much more restrictive and severe conditions of confinement than did plaintiff, some for greatly extended periods of time. Common sense, as well as the guidance offered by these cases, compels the conclusion that an award of $1,000 compensatory damages for twelve days in segregation is clearly excessive. Plaintiff suffered little more than he would have in general population. Although his activities were somewhat restricted, the conditions of confinement were essentially the same as those in general population. Although plaintiff undoubtedly missed the recreational activities of which he was deprived for twelve days, such a loss is not, as a matter of law, worth $83.00 per day in damages.

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* No claim for lost wages was made in the instant case (T. 85).

** In some cases the Courts have refused to award any compensatory damages. *Collins* v. *Hancock,* 354 F. Supp. 1253 (D.N.H. 1973) (30 days in solitary, 16 months in segregation); *Urbano* v. *McCorkle,* 346 F. Supp. 51 (D.N.J. 1973) (664 days in segregation); *Jordan* v. *Fitzharris,* 257 F. Supp. 674 (N.D. Cal. 1966) (12 days in isolation).

CONCLUSION

Summary judgment for plaintiff on the issue of liability should be vacated; summary judgment should be directed for the defendants Commissioner and Warden; the damage award should be set aside as excessive; the case should be remanded to the District Court as to the remaining defendants.

Dated: New York, New York
September 5, 1974

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Mary Ko , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for defendants-appellants herein. On the 5th day of September , 1974 , he served the annexed upon the following named person :

Phylis Skloot Bamberger,Esq.
The Lagal SAid Society
United States Courthouse
Foley Square
New York, New York 10007

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Mary Ko

Sworn to before me this
5 day of September , 197

Marsey Evens Reitler
Assistant Attorney General
of the State of New York